Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALAN R. KAHN and HUNTER A. HOGAN,

Petitioners,

vs.

VIRGINIA RETIREMENT SYSTEM, SYSTEMS HOLDINGS, INCORPORATED, CSX CORPORATION and RICHMOND FREDERICKSBURG AND POTOMAC CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the public announcement of the material terms of a tender offer fail to cause such offer to commence pursuant to Securities Exchange Act Rule 14d-2, 17 C.F.R. § 240.14d-2, as a matter of law, because:

a. The announcement, which had been agreed to by the bidder, was made by the target, even though the announcement, itself, contained an expression of the bidder's approval of the tender offer, furnished by the bidder; and

b. Although the announcement disclosed all material terms of the tender offer, the bidder and the tender were not explicitly labeled as such, despite the fact that investors, the media and others were able easily and

accurately to ascertain the identity of the bidder and the nature of the transaction from the wording of the announcement?

2. Should Securities Exchange Act Rule 14d-2c, 17 C.F.R. § 240.14d-2(c), which governs the commencement of a tender offer by public announcement, be interpreted so as to impede effectuation of the purpose of "best price" rule, Securities Exchange Act Rule 14d-10, 17 C.F.R. § 240.14d-10, which is intended to protect investors from discriminatory tender offers, and of Securities Exchange Rule 10b-13, 17 C.F.R. § 240.14d-13, which was adopted expressly to protect shareholders from fraudulent and manipulative devices and practices?

3. Does the fact that the public announcement of the material terms of a

tender offer made by the target, and containing the bidder's approval of the tender, was made to fulfill the target's disclosure requirements under § 10-b of the Securities Exchange Act of 1934, negate SEC 14d-2(b) so as to cause such public announcement not to commence the tender?

4. Should the "functional" interpretation of the "best price" provision of the Williams Act, given by the Second Circuit in order to effectuate the purposes of that Act, be endorsed by this Court, rather than the rigid, inflexible interpretation of the Fourth Circuit herein, which would foster evasion of that legislation?

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CSX CORPORATION and RICHMOND
FREDERICKSBURG AND POTOMAC CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on December 23, 1993.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS OF COURTS BELOW

Alan R. Kahn and Hunter A. Hogan v. Virginia Retirement System, et al., 13 F.3d 110 (4th Cir. 1993); 783 F.Supp. 266 (E.D. Va. 1992).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked by petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1254(1) for the review of a final judgment, dated December 23, 1993.

RELEVANT STATUTES

Section 14(d)(7) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(d)(7)(1988) and the following rules under the Securities Exchange Act of 1934: Rule 10b-5, 17 C.F.R. § 240.10b-5 (1992); Rule 14d-2, 17 C.F.R. § 240.14d-2

(1992); Rule 10b-13, 17 C.F.R. § 240.10b-13d (1992), the text of which are set forth in the Appendix submitted herewith.

STATEMENT OF THE CASE

Plaintiffs were the owners of securities of the Richmond Fredericksburg and Potomac Corporation ("RF&P") which were the subject of a tender offer made by the Virginia Retirement System ("VRS"). Plaintiffs, who contended that the tender offer began after a public announcement thereof, made on June 18, 1991 (the "Press Release"), commenced the action individually and on behalf of a class consisting of tendering holders of RF&P who received $39 per share (the "Outside Shareholders"), while two large shareholders, CSX Corporation ("CSX") and the Commonwealth of Virginia (the

"Commonwealth"), allegedly received substantially more.

The complaint charged that the defendants violated § 14d(7) of the Securities Exchange Act of 1934 and Rules 14d-10 and 10b-13, promulgated thereunder, by paying defendants CSX and RF&P more than the highest price offered to the Outside Shareholders.[1] The jurisdiction of the district court was based upon § 27 of the Securities Exchange Act, 15 U.S.C. § 78aa.

The defendants moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted defendants' motion, in an opinion and order dated January 23, 1992.

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[1] CSX and RF&P were charged as aiders and abettors of the payment.

Petitioners filed their Notice of Appeal to the United States Court of Appeals for the Fourth Circuit on March 10, 1992. On December 23, 1993 the Fourth Circuit entered its judgment affirming the district court's judgment of dismissal.

STATEMENT OF FACTS

As noted, the claims asserted herein arose out of the purchase by VRS of RF&P stock from two large shareholders, allegedly made during the tender offer for such stock, at prices higher than the $39 per share paid the Outside Shareholders. Thus, VRS purchased a right still held by the Commonwealth[2] in

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[2] Pursuant to a prior agreement, the Commonwealth had the right to any capital appreciation in the stock of over $28 per share. Based on the $39 per share price paid to the Outside Shareholders, the Commonwealth should have received $11 per share. In fact, it

over 3.5 million shares of RF&P previously transferred to VRS, and purchased the stock of CSX pursuant to a tripartite agreement between VRS, CSX and RF&P.

The aforesaid agreement consisted of interrelated and integral arrangements between RF&P, CSX and VRS, pursuant to which defendants agreed that:

1. CSX would tender 60% of the voting stock of RF&P for $105.8 million in cash, and exchange the balance of its RF&P shares for certain rail assets of RF&P, which together, were allegedly worth more than $39 per share; and

2. The Outside Shareholders would receive $39 per share for the RF&P stock which they tendered.

Consummation of the entire agreement

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got the equivalent of $48.25 per share.

by the defendants was made contingent upon the success of the tender offer vis-a-vis the Outside Shareholders.[3]

The agreement with CSX was formally executed on August 28, 1991, and consummated on October 10, 1991. (Payment to the Commonwealth was made on June 28, 1991.) The offer to the Outside Shareholders was formally made on August 31, 1991, and ended on October 9, 1991.

As noted, although the tender offer was formally made in August, it had been agreed to and announced by means of the Press Release in June. The relevant portion of that release, issued on RF&P stationery, is set forth below:

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[3] That portion of the tender offer was successful, the overall agreement was effected, and VRS ultimately obtained ownership of 99.7% of the stock of RF&P.

RF&P Special Committee Announces Revised Transaction

A Special Committee of RF&P Corporation's Board of Directors announced today that it was prepared to recommend to RF&P's Board of Directors a revised transaction among RF&P, CSX Corporation and the Virginia Retirement System in which RF&P's public shareholders would have the opportunity to receive $39 per share in cash for any and all of their shares. In the proposed transaction, CSX Corporation effectively would transfer to RF&P and VRS the approximately 6.8 million shares of RF&P it owns or controls for $35 a share and acquire the RF&P Railroad and receive certain other assets and benefits for $135 million, retaining the balance of $104 million in cash.

* * *

Jacqueline G. Epps, Chair of the Virginia Retirement System's Board of Trustees stated that "while the negotiations have been long and complicated, it appears that everyone stands to gain from the proposed transaction." (A-258.)

While the Press Release did not expressly use the words "tender offer" or specifically identify the bidder as such, that release was worded in such manner as to enable investors, by drawing inferences, to discern (accurately), the nature of the proposed transaction, the bidder, the stock sought, and the price to be paid therefor. As a consequence, the newspapers were able to, and did in fact, correctly report the entire transaction, as well as the reaction of shareholders and others thereto. Indeed, shareholder complaints about the transaction were made to the RF&P board.

In the Press Release, Jacqueline G. Epps, Chair of VRS's Board of Trustees, placed her imprimatur upon the transaction described therein, stating that "it appears that everyone stands to

gain" therefrom. The press viewed the Release as one in which VRS took part.

Petitioners contended that the Press Release, which publicly announced the essential terms of the tender offer, commenced such offer pursuant to Rule 14d-2(b). Petitioners also charged that during the pendency of the tender offer thus commenced, defendants violated § 14(d)(7), commonly known as the "best price" provision of the Williams Act by the purchase of RF&P stock at prices higher than that paid the Outside Shareholders.

Respondents, who asserted that the Press Release was intended as a fulfillment of RF&P's disclosure requirements under federal law, contended that Rule 14d-2(d) should be strictly construed, so that bidders would have

"certainty" as to the information which will trigger Rule 14d-2(b).[4]

The district court held that the Press Release did not commence a tender offer, as a matter of law, because:

1. The Press Release was not issued by the bidder and the court found "no evidence" that the Press Release was a joint effort or made on behalf of VRS; and

2. Although the identity of the bidder was clear from the text of the Press Release to the media and countless others, it was not clear to the Court.

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[4] The information which will trigger Rule 14d-2(b) is contained in Rule 14d-2(c). For a public announcement to commence a tender offer, Rule 14d-2(c) requires a bidder to make or affirm a public announcement which includes: "(1) the identity of the bidder; (2) the identity of the subject company; and (3) the amount and class of securities being sought and the price or range of prices being offered therefor."

The Court of Appeals affirmed the district court, on the ground that the Press Release was issued to comply with the disclosure requirements of Rule 10b-5 under the Exchange Act, and that to hold that such "otherwise proper" release commenced the tender offer would defeat the purpose of Rule 14d-2(c) by removing the certainty that such rule provides to bidders.

ARGUMENT

This case involves two main issues which, petitioners believe, make it appropriate for review on writ of certiorari. First, the Court of Appeals for the Fourth Circuit decided an important question of federal law with respect to the commencement of a tender offer under the Williams Act, which has not, but should be settled by this Court.

The court's decision, petitioners submit, fosters evasion of the Act. Second, the decision of the Fourth Circuit with respect to what constitutes a tender offer conflicts with the decision reached by the Second Circuit on the same issue. Both considerations for review will be separately discussed below.

I. THE COURT BELOW INTERPRETED SEC RULE 14d-2 IN A MANNER WHICH FRUSTRATED THE PURPOSE OF THAT RULE, AND NEGATED OTHER APPLICABLE LAW.

Petitioners contend that the tender offer was commenced by the Press Release, since that release furnished the investing public with all the information which, if publicly disclosed or affirmed by the bidder, would cause a tender offer to start. As noted, under Rules 14d-2(b) and 14d-2(c), a tender offer is commenced if a bidder issues (or affirms) a press

release which contains the identity of the bidder, the identity of the subject company, the amount and class of securities being sought and the price or range of prices being offered therefor.

The Press Release identified the bidder, subject company, securities being sought and the price being offered therefor, albeit not with the specific labels required by the courts below. Thus, the Press Release spoke in terms of a "transaction among" RF&P, CSX and VRS, the description of which was sufficient to enable investors to discern all the information which would ordinarily cause a tender offer to start. Although formally issued by RF&P's special committee, the release contained a declaration of approval of the disclosed transaction from Jacqueline G. Epps,

Chair of VRS, the bidder.

The information contained in the Press Release enabled the media to publicize accurately the tender offer transaction. Indeed, a number of national newspapers correctly described and discussed the tender. Certain of the newspapers which accurately reported the disclosed transaction, also included in their coverage, comments from shareholders, analysts, stock brokers and lawyers, who discussed, questioned and/or "groused" about various aspects of the "deal," including the treatment accorded the minority shareholders. In short, the transaction was correctly reported, and received wide publicity.

Although the Fourth Circuit conceded that an analysis of the Release would "produce the information needed to

satisfy Rule 14d-2(c)," it held that the Press Release did not commence the tender offer for two reasons:

1. Rule 14d-2(c) was intended to provide certainty to bidders as to when a tender offer commences. If a public announcement of a tender offer, which required some inferences to be drawn in order to ascertain its meaning, were held to cause a public announcement to commence a tender offer, the purpose of the rule would be defeated; and

2. Assuming that the Press Release was jointly made with VRS, the bidder, VRS never "affirmed" the "subsequent" newspaper coverage which accurately described the tender.

The court stated that although the inclusion of the statement of the bidder's chair approving the transaction

in the Press Release "may have been ill-advised," it did not constitute an affirmation of the Press Release, because that release was made by RF&P to comply with its disclosure duty.

As will be shown below, each of the aforesaid bases of the court's decision, are in error, and such decision should be reversed.

A. Identification Which Can Be Accurately Ascertained By Inference, Can Have The Same Effect On Stock Market Activity As Explicit Identification. Both Should Be Treated In The Same Manner In Interpreting Rule 14d-2(c).

The court below held that the requirements of Rule 14d-2(c) were intended "to provide certainty to bidders and to prevent the inadvertent commencement of a tender offer." Thus, the court concluded, if the drawing of inferences from a public announcement of

a tender is required to obtain the information which, if divulged in explicit fashion, would cause such announcement to start a tender offer, the announcement will not be deemed to start a tender. To hold otherwise, the court stated, would defeat the purpose of Rule 14d-2(c) by removing the certainty it provides to bidders, by allowing investors and reporters "to control the commencement of tender offers."

The court's conclusion is basically flawed. If a bidder elects to word a public announcement with respect to a tender offer in such a fashion as to enable investors to obtain by inference, the same information which they would have obtained had the language used been express, the tender would be started by the bidder who released the information

to the marketplace, not the investor who read the announcement and identified to whom and what it referred.

Concededly, not all inferences can be drawn with certainty. However, it is beyond dispute that some identifications, although not explicit, may leave no doubt as to person or thing identified. For example, if a newspaper were to report statements made by the "President of the United States," readers can be "certain" that the identity of the speaker was William J. Clinton. Similarly, if a public announcement were to state that a tender offer was being made by the largest manufacturer of computers in the United States, investors could be certain that the bidder was IBM.

Although some non-explicit identifications are more certain than

others, whether or not a public announcement made known with certainty, the information which commences a tender, is a question of fact which should not ordinarily be resolved on a motion to dismiss. Where, as in this case, the relevant identities could be and were readily and accurately ascertained by numerous persons, it is a denial of reality for the court to hold, as a matter of law, that such identities were not disclosed for the purposes of Rule 14d-2(c). The effect on the securities market is the same when the nature of a transaction and the identity of the participants therein are made known to the investing public, whether the identifications are made in an indirect or explicit manner.

Accordingly, although the decision

below provides "certainty to bidders,"[5] it is the certainty that they can, with impunity, disclose all material terms of a tender offer without commencing such offer, if they do not "expressly" label the transaction and the participants therein. Thus, the decision leaves the investing public subject to one of the abuses that the Williams Act was designed to remedy. As is apparent from this

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[5] Bidders have already been provided with all the "certainty" they need. SEC Rule 14d-2(d) clearly instructs persons announcing a tender offer as to the kind of announcement which will not trigger application of the "make or withdraw" requirement of Rule 14d-2(b). The only substantive difference between the material set forth in 14d-2(c) and 14d-2(d) "is the amount of securities of [the] class [of securities] to be sought or the consideration to be offered therefor." Thus, a bidder can be "certain" that he will not trigger Rule 14d-2 simply by omitting disclosure of the securities sought and the price to be offered therefor.

case, accurate, non-explicit identifications can generate activity normally associated with tender offers, such as arbitrage activity and the capping of the target's market price.

Moreover, as noted, the holding of the court below was not at all necessary to give bidders the "certainty" the Williams Act was intended to provide. The promulgation of Rule 14d-2(d) and the designation by the Securities Exchange Commission of the securities and price as the factors whose disclosure would vitiate a "safe harbor,"[6] creates a

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[6] Specifically, Rule 14d-2(d) permits the public announcement of (1) the identity of the bidder, (2) the identity of the subject company and (3) a statement that the bidder intends to make a tender offer in the future for a class of equity securities of the subject company "which statement does not specify the amount of securities of such class to be sought or the consideration to be offered therefor," without the immediate

certainty, which unlike that created by the court below, is clearly consonant with the purpose of Rule 14d-2, which was designed to protect investors against market manipulation and the creation of an arbitrage market. Price, perhaps more than any other tender offer term, once announced in connection with a proposed tender offer, has a direct impact on investors' market expectations and trading activity.[7]

In this case, where price was one of the tender offer terms announced, the decision of the court below clearly

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commencement of a tender offer.

[7] The district court correctly noted in its decision below that "[s]uch pre-commencement public announcements cause security holders to make investment decisions with respect to a tender offer on the basis of incomplete information and trigger market activity normally attendant to a tender offer, such as arbitrageur activity." (A-339)

negates the purpose of Rule 14d-2. Indeed, in its short-sighted attempt to provide unneeded "certainty" for bidders, the court below reached a decision which conflicts with the very basis of the Williams Act, and if allowed to stand, will create a judicially sanctioned vehicle for the abuse of the tender offer process.

B. Rule 10b-5 Does Not Compel The Decision Reached Below.

In its decision, the court below opined that the public announcement made by RF&P in the Press Release arose "solely out of RF&P's disclosure duty." Accordingly, the court held, that announcement did not commence a tender offer under Rule 14d-2(b). However,

although the court below based its decision on its conclusion that the Press Release was issued by RF&P in order to comply with the full disclosure requirements of Rule 10b-5, on the other hand, the court held that the disclosure made in such release was too murky to meet the requirements of Rule 14d-2(c). In short, the court held, non-specific disclosure by inference is fine for "the mandatory disclosure requirements of Rule 10b-5," but inadequate for Rule 14d-2(c), even though both Rules are aimed at preventing market manipulation.

The glaring inconsistency in the court's decision furnishes bidders with a blueprint for manipulating a target's market price months before a tender offer is commenced. Thus, although the factual situation in this case is not a common

one, the decision rendered has general application, and could in the future, be imaginatively exploited, with impunity, by bidders in tender offers to cap the market price of the target's stock. The availability of such a tool for manipulation should be eliminated now by this Court.

II. THE DECISION OF THE FOURTH CIRCUIT HEREIN CONFLICTS WITH THAT OF THE SECOND CIRCUIT IN FIELD V. TRUMP

In holding that the Press Release did not commence a tender offer because it did not "expressly" label the bidder or the proposed transaction, the Fourth Circuit adopted the defendants' contention that Rule 14d-2 should be strictly construed. In accepting the defendants' argument, the court made a determination which is in basic conflict with the "functional" interpretation of

the Williams Act made by the Second Circuit in Field v. Trump.[8] In that case, a tender offer which had been publicly announced by the target was withdrawn by the bidder, which thereupon negotiated purchases of stock held by large shareholders at an allegedly higher price. Following such purchases, the target announced that the bidder would be making a tender at a "new" price.

In Field v. Trump, the court noted that "[t]he Williams Act does not define 'tender offer.'" Thus, the court stated, "[c]ourts faced with the question of whether purchases of a corporation's shares are . . . part of a tender offer" have applied a "functional test" that effectuates the purposes of the Williams

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[8] 850 F.2d 938 (2d Cir. 1988), cert. denied, 489 U.S. 1012 (1989).

Act. The court instructed that whether a tender offer is in effect "is not determined simply by the . . . use of . . . labels," and that the substance, rather than the form of the transaction controls. In that case, the court held, successive tenders, interrupted by a withdrawal, should be viewed as a single offer for purposes of the Williams Act. The court observed that unless the tenders were integrated, "the 'best-price rule' is meaningless."

Similarly, in this case, unless a public announcement which has disclosed the material terms of a tender offer, albeit, without labels, is held to have commenced a tender, the "best price" provision of the Williams Act will be meaningless. Bidders could disseminate to investors, information which would cap

the market price of the target's stock, even in the face of information indicating that such stock is actually worth more. The "collar" effect was explained in Billard v. Rockwell Intern. Corp.:[9]

> In the face of Rockwell's announced plans to acquire all Collin's common stock for $25 per share, investors would understandably hesitate before paying more than $25 per share for it, even if they believed it worth more than that amount, since no one could recover more than that amount unless shareholders owning more than one-third of the outstanding shares resisted the tender offer and opposed the proposed merger.

Thus, investors are placed at a disadvantage by the disclosure of a tender offer price until the time the tender offer is formally begun.

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[9] 85 F.R.D. 662, 665 (S.D.N.Y. 1980).

Accordingly, the rigid interpretation of the Fourth Circuit, which postpones commencement of a tender after its terms are disclosed, operates to vitiate the "best price" provision of the Williams Act, while the conflicting interpretation of the Second Circuit operates to enforce it.

Moreover, the decision of the Fourth Circuit which restrictively interprets Rule 14(d)-2, is contrary to other relevant law. It is a well-established rule of statutory construction that "the reach of remedial statutes is to be broadly interpreted, while its exceptions are to be narrowly construed."[10]

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[10] Pennwalt Corp. v. Centaur Partners, 710 F.Supp. 111, 117 (E.D. Pa. 1989). See also Piedmont & Northern Ry. v. ICC, 286 U.S. 299, 311-12 (1932):

> The . . . Act was remedial legislation and should

Statutory exceptions are not to be implied, and "[w]here a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions."[11] This Court, in Tcherepnin v. Knight,[12] applying the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes," specifically held that the "Exchange Act quite clearly falls into the category of remedial legislation."

> therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended.

[11] 2A Sutherland Statutory Construction § 47.11 at 165 (5th ed., 1992 revision), and cases cited therein.

[12] 389 U.S. 332, 336 (1967).

In the context of the Williams Act, it has been held that "to serve the purposes of the Williams Act, there is need for flexibility in fashioning a definition of tender offer."[13] As was noted in Hanson Trust PLC v. SCM Corp.:

> Aware of the almost infinite variety in the terms of most tender offers and concerned that a rigid definition would be evaded, Congress left to the court and the SEC the flexibility to define the term.[14]

The canons of statutory construction are also applicable to SEC rules.[15] Such

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[13] S.E.C. v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 951 (9th Cir. 1985).

[14] 774 F.2d 47, 56 (2d Cir. 1985) (citation omitted).

[15] See generally 73 C.J.S. Public Administrative Law and Procedure, § 94 at 610 (1983 and 1992 Supp.) (the rules and regulations of a public administrative agency are subject to the same principles of construction applicable to statutes); accord 1A Sutherland Statutory

canons should be applied in this case, petitioners submit, since if Rule 14d-2 is rigidly construed, as demonstrated above, it could be evaded with ease.

The Fourth Circuit, however, ignored the facilitation of evasion which its decision would undoubtedly engender as well as the well-established rules of statutory construction and, in effect, stood them on their head, by reading the general provision of Rule 14d-2 narrowly and its exception, Rule 14d-2(d), broadly.

Construction § 31.06 at 532 (4th ed., 1985 and 1992 Supp.); Miller v. United States, 294 U.S. 435 (1935).

See also Kaufman v. Cooper Companies, Inc., 719 F.Supp. 174, 179 (S.D.N.Y. 1989) (applying principles of statutory construction to SEC Rule 14a-3(b)); SEC v. National Securities, Inc., 393 U.S. 453 (1969) (applying principles of statutory construction to SEC Rule 10b-5).

Such improper construction flies in the face of well established authority, including that of the Second Circuit, and should be rejected by this Court.

CONCLUSION

For the reasons set forth above, the instant petition should be granted.

Dated: New York, New York
March 21, 1994

Respectfully submitted,

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APPENDIX

APPENDIX TO PETITION FOR CERTIORARI

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EDITOR'S NOTE

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ALAN R. KAHN; HUNTER A. HOGAN, JR.,
Plaintiffs-Appellants,

v.

VIRGINIA RETIREMENT SYSTEM; SYSTEMS HOLDINGS, INCORPORATED; CSX CORPORATION; RICHMOND FREDERICKSBURG AND POTOMAC CORPORATION,
Defendants-Appellees.

No. 92-1284

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-91-551-R)

Argued: October 27, 1992

Decided: December 23, 1993

Before WIDENER, PHILLIPS, and WILLIAMS, Circuit Judges.

Affirmed by published opinion. Judge Widener wrote the opinion, in which Judge Phillips and Judge Williams joined.

COUNSEL

ARGUED: Sidney B. Silverman, SILVERMAN, HARNES, OBST-FELD & HARNES, New York, New York, for Appellants. James E.

Farnham, HUNTON & WILLIAMS, Richmond, Virginia, for Appellee. ON BRIEF: Joan T. Hamca, SILVERMAN, HARNES, OBSTFELD & HARNES, New York, New York; Stephen T. Gannon, MCSWEENEY, BURTCH & CRUMP, P.C., Richmond, Virginia, for Appellants. Anthony F. Troy, MAYS & VALENTINE, Richmond, Virginia, for Appellees Virginia Retirement System and System Holdings; James L. Sanderlin, MCGUIRE, WOODS, BATTLE & BOOTHE, Richmond, Virginia; Stephen R. Larson, CSX CORPORATION, Richmond, Virginia, for Appellee CSX.

OPINION

WIDENER, Circuit Judge:

Appellants, Alan R. Kahn and Hunter A. Hogan, Jr. (Kahn), owners of RF&P securities which were subject to the transactions hereinafter mentioned, appeal the dismissal of their federal securities claim against Virginia Retirement System (VRS), Systems Holdings, Inc. (SHI) (a subsidiary of VRS), CSX Corporation (CSX), and RF&P Corporation (RF&P). The district court dismissed Kahn's claim pursuant to Fed. R. Civ. P. 12(b)(6). Reviewing the decision of the district court *de novo*, *Revene v. Charles County Comm'rs*, 882 F.2d 870, 872 (4th Cir. 1989), and accepting as true all facts alleged by Kahn, *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 967 (4th Cir.), *cert. denied*, 113 S. Ct. 411 (1992), we are of opinion that the district court properly dismissed Kahn's claim. Accordingly, we affirm.

I.

This case arises from the restructuring of RF&P, and the dispositive issue is whether a press release[1] issued by the RF&P Special

[1]Kahn's complaint alleges that the June 18 press release was a joint release by RF&P, CSX, and VRS. The district court determined that the press release was not a joint release, see *Kahn v. Virginia Retirement System*, 783 F. Supp. 266, 271 (E.D. Va. 1992), and Kahn argues on appeal that the press release was joint because, although issued on RF&P

Committee on June 18, 1991 commenced a tender offer under Rule 14d-2 under the Williams Act. 17 C.F.R. § 240.14d-2. Before we address the press release in some detail, however, it is important to place it in the context of the RF&P restructuring as a whole.

Beginning in 1983 CSX wanted to purchase or otherwise control RF&P's railroad assets to gain ownership of that 113-mile rail line that would allow CSX to easily link its northern rail lines (the old Chessie system) and its southern rail lines (the former Seaboard system). See *Kahn v. Virginia Retirement System*, 783 F. Supp. 266, 267 (E.D. Va. 1992). In 1985 RF&P formed a Special Committee of independent RF&P Board of Directors members to evaluate different proposals on how best to structure a deal with CSX. See 783 F. Supp. at 267. Between 1986 and 1991 the Special Committee considered and proposed various transactions that RF&P's Board of Directors (Board) rejected. See 783 F. Supp. at 267.

In February 1991 the Virginia General Assembly directed in the proposed state budget that VRS purchase, for approximately $71 million, the Commonwealth's appreciation rights on 3.5 million restricted RF&P shares held by VRS. See 783 F. Supp. at 267. These appreciation rights restricted VRS's ability to sell the RF&P shares and entitled the Commonwealth to purchase the shares from VRS at book value. The Commonwealth could then resell the shares to VRS at market price, thus allowing the Commonwealth to benefit from any realized appreciation on the shares. See 783 F. Supp. at 268. In May 1991 the Governor signed this measure into law. See 783 F. Supp. at 268.

On June 18, 1991, the Special Committee issued a press release recommending to the Board a revised transaction involving RF&P, CSX, and VRS,[8] and on June 21 the Board issued a press release

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stationery, it contained statements of approval by a representative of CSX and Jacqueline G. Epps, Chair of VRS's Board of Trustees. Without deciding the issue, we accept as true the facts alleged by Kahn and assume for purposes of this decision that the press release was joint between RF&P, CSX, and VRS.

[8]The press release, issued on RF&P stationery, states in full:

agreeing in principle with the three-way transaction. 783 F. Supp. at 268. Following this press release three important transactions occurred. First, pursuant to the state budget directive, VRS transferred funds to the Commonwealth on June 28, 1991, and obtained clear title

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RF&P SPECIAL COMMITTEE ANNOUNCES REVISED TRANSACTION

A Special Committee of RF&P Corporation's Board of Directors announced today that it was prepared to recommend to RF&P's Board of Directors a revised transaction among RF&P, CSX Corporation and the Virginia Retirement System in which RF&P's public shareholders would have the opportunity to receive $39 per share in cash for any and all of their shares. In the proposed transaction, CSX Corporation effectively will transfer to RF&P and VRS the approximately 6.8 million shares of RF&P it owns or controls for $35 a share and acquire the RF&P Railroad and receive certain other assets and benefits for $135 million, retaining the balance of $104 million in cash.

Speaking through its chairman, C. Coleman McGehee, the Special Committee announced that the proposed transaction still is subject to a number of conditions including negotiation of definitive agreements and approval by the RF&P Board. As a part of the proposed offer, the Special Committee will recommend that the RF&P Board not declare the regular second quarter dividend, retaining the right to declare the dividend at a later date if the transaction does not proceed.

Mr. McGehee noted that the revised transaction is a significant improvement for the public shareholders. As originally proposed in August, 1990, the public shareholders would have been able to exchange only about one-sixth of their shares at $35 a share.

Jacqueline G. Epps, Chair of the Virginia Retirement System's Board of Trustees stated that "while the negotiations have been long and complicated, it appears that everyone stands to gain from the proposed transaction."

John W. Snow, chairman and chief executive officer of CSX, said, "We are pleased with the agreement and look forward to continuing to operate the RF&P railroad as a key part of the CSX rail system."

to the 3.5 million RF&P shares it held.[3] See *Kahn*, 783 F. Supp. at 268. On August 28, 1991, CSX and RF&P entered into an Asset Purchase Agreement under which CSX would obtain RF&P's railroad assets in exchange for 3.9 million shares of non-voting RF&P stock. See 783 F. Supp. at 268. Also on August 28, 1991, VRS and CSX entered into a Stock Purchase Agreement under which VRS would pay $105.8 million to CSX for 2.97 million shares of RF&P voting and non-voting stock.[4] See 783 F. Supp. at 268.

On August 30, 1991, SHI, a wholly-owned subsidiary of VRS created expressly to purchase and hold RF&P shares, formally issued a tender offer and commenced the three-way transaction. 783 F. Supp. at 268. On September 24, 1991, Kahn instituted this suit against VRS, CSX, and RF&P alleging violations of the § 14(d)(7) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78n(d)(7), Securities Exchange Commission (SEC) Rules 14d-10 and 10b-13, 17 C.F.R. §§ 240.10b-13 & 240.14d-10, and breach of fiduciary duty. Kahn sought damages rather than injunctive relief, and the three-way transaction continued and was completed on October 10, 1991, with the tendering of substantially all of RF&P's outstanding shares and the closing of both the Asset Purchase and the Stock Purchase Agreements. 783 F. Supp. at 268. The net effect of the transaction is best described by the district court:

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[3]The net effect of this transaction was that the Commonwealth received $48.21 per share. At the time of the transaction the Commonwealth had the right to purchase the shares from VRS at VRS's book value of $28 per share then resell the shares to VRS, at market price. In this instance, however, the Commonwealth sold its rights in the shares to VRS for $20.21 per right (3.5 million rights divided by $71 million) rather than purchasing and reselling the shares. This was the equivalent of the Commonwealth purchasing the shares from VRS for $28 per share and reselling the shares to VRS for $48.21 per share.

[4]Under the stated terms of the Asset Purchase Agreement CSX received assets from RF&P in return for RF&P stock valued at $35 per share for purposes of the agreement. Under the stated terms of the Stock Purchase Agreement CSX and related shareholders received from $35 to $39 per share in cash. Kahn alleges, however, that under both the Asset Purchase and Stock Purchase Agreements, CSX received more than $39.00 per share because the terms of Asset Purchase Agreement undervalued the railroad assets received by CSX.

> In short, RF&P is now a real estate company with no railroad operations; VRS beneficially owns substantially all of the outstanding RF&P stock; CSX owns and operates the railroad assets; and almost all of RF&P's public shareholders have received $39.00 per share in cash for their stock and are no longer shareholders of RF&P.

783 F. Supp. at 268.

On October 23, 1991, defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). In granting the motion to dismiss, the district court held that the June 18, 1991 press release of the Special Committee did not commence a tender offer and that the tender offer did not commence until the announcement by SHI on August 30, 1991. 783 F. Supp. at 271-72. Therefore, the share purchases on June 28 and August 28 did not occur during the tender offer period and thus did not violate § 14(d)(7) of the Exchange Act or Rules 14d-10 and 10b-13.[3] 783 F. Supp. at 272. Kahn now appeals.

II.

Congress passed the Williams Act, 15 U.S.C. §§ 78m(d)-(e) & 78n(d)-(f) (amending Exchange Act and adding among others § 14(d)), in 1968 in response to the proliferation of cash tender offers as a means of effecting corporate takeovers. See *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 22 (1977). Unlike proxy solicitations or securities exchange offers, the traditional takeover vehicles, cash tender offers were not subject to the "disclosure requirements of the federal securities laws." 430 U.S. at 22. Through the Williams Act Congress sought to protect investors by requiring tender offerors to make full and adequate disclosures of tender offers and by imposing certain obligations on tender offerors during the tender offer period. See 430 U.S. at 22-23; 15 U.S.C. §§ 78m(d)(1), 78n(d)(1), (5)-(7).

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[3] After dismissing the federal securities claims, the district court, with agreement of all parties, declined to exercise supplemental jurisdiction over the state law breach of fiduciary duty claim pursuant to 28 U.S.C. § 1367(c). See *Kahn*, 783 F. Supp. at 272.

The Williams Act becomes operative when a purchaser makes a tender offer that will result in the purchaser owning more than 5% of the class of stock sought. See 15 U.S.C. § 78n(d)(1). Although a tender offer is the threshold to the protection of the Williams Act, neither Congress nor the SEC expressly defined what constitutes a tender offer. See *Telvest, Inc. v. Bradshaw*, 618 F.2d 1029, 1032 (4th Cir. 1980). While this vagueness gave courts flexibility in determining which actions constituted tender offers and thus were properly subject to the Williams Act, see *Kahn*, 783 F. Supp. at 269, the vagueness also allowed some abuses to continue that the Williams Act was designed to remedy. See SEC Exchange Act Rel. No. 34-16384 (November 29, 1979) (Release 16384) (noting problems with pre-tender offer public announcements). A prime problem was with companies making public announcements prior to commencing a tender offer. See Release 16384. These pre-tender offer announcements would generate activity normally associated with tender offers, such as arbitrage activity, and force investors to make decisions with respect to the proposed tender offer based on incomplete information. See Release 16384.

To curb this practice of bidders announcing the material terms of a tender offer prior to the formal commencement of the tender offer, the SEC promulgated Rule 14d-2. See Release 16384; 17 C.F.R. § 240.14d-2. Rule 14d-2 states that the issuance of a "public announcement by a bidder . . . with respect to a tender offer . . . shall be deemed to constitute the commencement of a tender offer" and thus trigger the application of the Williams Act. 17 C.F.R. § 240.14d-2(b). To commence a tender offer the public announcement must contain: "(1) The identity of the bidder; (2) The identity of the subject company; and (3) The amount and class of securities being sought and the price or range of prices being offered therefor." 17 C.F.R. §§ 240.14d-2(b) & (c). The SEC included these specific requirements to provide certainty to bidders and prevent the inadvertent commencement of a tender offer. See Release 16384.

Once a tender offer commences under Rule 14d-2(b) the bidder must within five days either postpone the commencement of the tender offer by making a public announcement that the tender offer will not be continued or comply with the filing requirements of the Williams Act. See 17 C.F.R. §§ 240.14d-2(b)(1) & (2). If the bidder takes

no action, then the tender offer will be deemed to have commenced on the date of the public announcement and the bidder will be in violation of filing and disclosure requirements. See Release 16384; 17 C.F.R. § 240.14d-2(b). "As a result, it is not anticipated that a bidder making such a public announcement will select the 'do nothing' alternative." Release 16384. Typically, if a bidder chooses to do nothing, interested investors will seek to have the public announcement declared a tender offer and to force the bidder to comply with the disclosure requirements of the Williams Act. See, e.g., *Weeden v. Continental Health Affiliates, Inc.*, 713 F. Supp. 396, 397 (N.D. Ga. 1989) (seeking to force defendant to comply with Rule 14d-2(b)(2)'s "Five Day Rule"); *American Carriers, Inc. v. Bayree Investors, Inc.*, 685 F. Supp. 800, 801 (D. Kan. 1988) (seeking to enjoin defendants from making or announcing tender offer unless defendants comply with disclosure required by Exchange Act).

III.

In light of the purpose of Rule 14d-2 and the requirements of Rule 14d-2(c), we now turn to the press release at issue. The district court determined that the press release did not commence a tender offer because it did not satisfy the requirements of Rule 14d-2(c). See *Kahn*, 783 F. Supp. at 271. Among the reasons the district court gave were that the press release did not state that there was to be a tender offer and that the press release identified neither VRS nor SHI as the bidders. See 783 F. Supp. at 271. Having reviewed the press release, we agree with the district court's findings and are of opinion that the press release does not constitute a tender offer under Rule 14d-2(b) because it does not satisfy the requirements of Rule 14d-2(c). Even though Kahn admits that "the [press] release did not expressly mention a tender offer or VRS[,]" Kahn asserts that the press release satisfies the requirements of Rule 14d-2(c) because the press release is joint or alternatively because one can infer the required information from the press release. We will address each of these assertions in turn.

In SEC Exchange Act Rel. No. 34-16623 (March 5, 1980) (Release 16623) the SEC interpreted the tender offer rules in a question and answer format. A question directly on point states the following:

> 1. Question: Will a public announcement by the subject company or by another person having no relationship with a bidder of a bidder's intention to make a cash tender offer together with the information referred to in Rule 14d-2(c) commence the five business day period in Rule 14d-2(b)?
>
> Response: No. Only a public announcement by the bidder or on the bidder's behalf will commence a tender offer pursuant to any of the provisions of Rule 14d-2. n2 As a practical matter, however, if a bidder's intention becomes generally known, the bidder may be unable to deny its intentions, and any affirmation of the information referred to in Rule 14d-2(c) by or on behalf of the bidder would cause the tender offer to start under Rule 14d-2(b).
>
> n2 In certain situations where the bidder and the subject company agree or arrange that the subject company will make the public announcement and such public announcement does not arise solely out of the subject company's disclosure duty, the public announcement will be viewed as being made on behalf of the bidder.

Release 16623. Based upon his reading of Release 16623, Kahn alleges that the press release constitutes a tender offer because it either was made by RF&P on behalf of VRS, was a joint release, or was affirmed as a tender offer by VRS. In support of this assertion Kahn relies upon *Field v. Trump*, 850 F.2d 938 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989). In *Field*, Pay'n Save, the target corporation, issued a press release stating "that it had reached a merger with the Trumps and that the Trumps were initiating a tender offer at $22.50." 850 F.2d at 941. The *Field* court recited that this press release by the target corporation constituted a tender offer on behalf of the bidder. 850 F.2d at 943.

Assuming as we must that the press release involved here was joint, this fact alone does not alter our decision. Under Release 16623, a joint press release will not commence a tender offer unless it also contains the specific information listed in Rule 14d-2(c). See Release 16623. The assumed jointness does not alter the fact that it neither states that there will be a tender offer nor identifies either VRS or SHI

as the bidders. Therefore, we are of opinion that the press release does not commence a tender offer under Rule 14d-2(b) as construed in Release 16623.

As for *Field*, it supports our holding in several respects. First, the press release positively identified the Trumps as the bidders and specifically stated that the Trumps were initiating a tender offer. See *Field*, 850 F.2d at 941. In contrast, the press release at issue here did not identify the bidders and did not state that anyone was initiating a tender offer. Second, the actions by the Trumps following the press release indicated that they considered the press release to be a tender offer because they tried to withdraw the tender offer under Rule 14d-2(b)(1). See 850 F.2d at 943. In contrast, no party in this case took any action following the press release that would indicate that any party considered the press release to constitute a tender offer. Neither VRS nor SHI did anything following the press release to indicate that they considered it to be a tender offer. To the contrary, SHI expressly made the tender offer actually involved here on August 30, 1991. Furthermore, no shareholder sought to have the press release declared to have commenced a tender offer, to enjoin the alleged tender offer, or to force VRS or SHI to comply with the disclosure provisions of the Exchange Act. Although we recognize that reliance is not a necessary element to the commencement of a tender offer by a public announcement, and neither does a failure to take early action necessarily bar a later lawsuit, the facts of this case reveal that only by virtue of hindsight has anyone considered the press release of June 18, 1991 to commence a tender offer.

Alternately, Kahn asserts that "[a]lthough the June 18 press release did not expressly identify the bidder and the proposed transaction, it described them with sufficient accuracy to allow investors to discern their identity." In support of this assertion, Kahn explains that the word "exchange" used in the press release refers to a tender offer and that one can readily discern the identity of VRS as the bidder. Kahn also quotes a June 21, 1991, newspaper editorial that explained the transaction which later took place.[9] Although these inferences by Kahn and the press produce the information needed to satisfy Rule

[9]*Virginia Takes Stock*, Editorial, *Wash. Times*, June 21, 1991, at F2 (Final Edition).

14d-2(c), we are of opinion that Kahn's argument in this instance must fail when subjected to scrutiny in light of the purpose of Rule 14d-2.

The SEC included the specific requirements of Rule 14d-2(c) to provide certainty to bidders and to prevent the inadvertent commencement of a tender offer. See Release 16384. If we were to hold that inferences alone would cause an otherwise proper public announcement to commence a tender offer, we would defeat the purpose of Rule 14d-2(c) by removing the certainty that it provides to bidders by allowing knowledgeable investors, such as Kahn, President of an investment management firm, and reporters to control the commencement of tender offers. Furthermore, the fact that the press may predict a resultant transaction from a press release is not alone sufficient to commence a tender offer. Although a tender offer may commence if a bidder's intentions become generally known and the bidder or someone on behalf of the bidder affirms the information, see Release 16623, this has not occurred in this case. Even if the newspaper editorial may indicate that VRS's intentions became generally known, Kahn has not alleged any facts indicating that VRS subsequently affirmed this information. Although the June 18 press release is assumed to be joint, this does act as an affirmation by VRS of the information contained in a *subsequent* newspaper editorial.

The district court decided that the only reason the Special Committee issued the press release of June 18, 1991, was to comply with the mandatory disclosure requirements of Rule 10b-5 under the Exchange Act. See 17 C.F.R. § 240.10b-5(c). We think that ruling was correct. While there does not seem to be any generally agreed upon time of disclosure for a mandatory disclosure of merger or other like negotiations, which these were, there is no doubt that such negotiations must be disclosed at some time. See *Staffin v. Greenberg*, 672 F.2d 1196 (3rd Cir. 1982), in which the court held that when an agreement in principle had been reached, a duty to disclose did exist. On June 18, 1991, the date of the press release, agreement in principle had not been reached and the negotiations, while they were certainly past the initial stages, were far from over. They yet depended, for example, on approval of the directors of RF&P, the transfer of funds to the Commonwealth, the consummation of the asset purchase agreement, and the stock purchase agreement. The Supreme Court discussed the gen-

eral question in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), and while it did not decide the question of the timing of a required announcement, it did decide the question of materiality and held that information so material as to be subject to disclosure is material when it concerns "the existence and status of preliminary merger discussions ... significant to the reasonable investor's trading decision." 485 U.S. at 235. As we have noted, while the Court did not decide the question of timing, it did discuss the same and found

> ... no valid justification for artificially excluding from the definition of materiality information concerning merger discussions, which would otherwise be considered significant to the trading decision of a reasonable investor, merely because agreement-in-principle as to price and structure has not yet been reached by the parties or their representatives.

485 U.S. at 236. We think that the matter contained in the press release of June 18, 1991 with respect to the negotiations between CSX, RF&P, and the Virginia Retirement System were matters significant to a reasonable investor's trading decisions and thus were material. We do not decide when the disclosure of such negotiations was required, because we are of opinion that the disclosure of them at the time of the press release was appropriate to meet the disclosure requirements of the Exchange Act. Since the Special Committee, and thus RF&P, did no more than make a public announcement arising solely out of RF&P's disclosure duty, the public announcement is not viewed as being made on behalf of the bidder, the Virginia Retirement System. Release No. 16623, n. 2.

Although the inclusion of statements of other parties to the transaction in the June 18, 1991 press release may have been ill-advised, which, in view of the pleadings, has resulted in our assumption that the same was joint, we are of opinion, for the reasons we have expressed, that the press release was not a public announcement that commenced a tender offer under Rule 14d-2(b).

Accordingly, the judgment of the district court is

AFFIRMED.[7]

[7]Our opinion has covered all of the "Statement of Issues," 1(a)(b), 2 and 3 found on pages 2 and 3 of appellants' brief. Issue 4, appellants' brief, p. 3, only concerns defenses asserted by defendants and was not considered. So far as any other issues may have been inferentially stated by appellants, we are of opinion they are without merit.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KAHN, et al,)
)
Plaintiffs,)
)
v.)
)
VIRGINIA RETIREMENT SYSTEM, et al.,)
)
Defendants.)

File No. 91-551

ORDER

This matter is before the Court on a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief an be granted, in which all the Defendants have joined. In addition, the Commonwealth Defendants (Virginia Retirement System and System Holdings, Inc.) have filed a Motion to Dismiss based on the sovereign immunity granted by the Eleventh Amendment.

For the reasons discussed in the accompanying Memorandum Opinion, the

Defendants' Rule 12(b)(6) motion is GRANTED, and the Court hereby DISMISSES WITH PREJUDICE the Plaintiffs' claims brought under the federal securities laws. The Court declines to exercise supplemental jurisdiction over the Plaintiffs' state law claim. Finally, the Commonwealth Defendants' motion is DENIED.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

DATE: 1/23/92 \s\ Richard L. Williams
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KAHN, et al,)
)
Plaintiffs,)
)
v.)
)
VIRGINIA RETIREMENT SYSTEM, et al.,)
)
Defendants.)

File No. 91-551

MEMORANDUM OPINION

This matter is before the Court on a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, in which all the Defendants have jointed. In addition, the Commonwealth Defendants (Virginia Retirement System and System Holdings, Inc.) have filed a Motion too Dismiss based on the sovereign immunity granted by the Eleventh Amendment. For the reasons discussed below, the Defendants' Rule 12(b)(6) motion is

granted, and the Commonwealth Defendants' motion is denied.

FACTUAL BACKGROUND

This case arises out of the recent restructuring of RF&P Corporation (RF&P). While the incidents of the restructuring were complex, involving a series of related transactions, neither the timing nor the substance of these transactions appears to be much in dispute. The underlying facts have been thoroughly and publicly documented as they transpired. The adequacy of that disclosure has not been challenged. Thus, the question presented is not what happened factually, but rather what legal consequences attach to these facts.

Since 1983, defendant CSX Corporation has sought to acquire RF&P's railroad assets because RF&P's 113-mile

rail line is critically situated in the heart of CSX's 19,200 mile network of rail lines, and links the old Chessie system (in the north) to the former Seaboard system (in the South). Without access to the RF&P rail lines, CSX would be forced to seek costly and inefficient methods of connecting its rail traffic. In 1985, RF&P formed a Special Committee to consider various alternative transactions in connection with CSX. From 1986 to early 1991, a sale of RF&P's railroad assets, an asset-stock exchange, a merger/cash-out, and a tender offer, were all proposed and eventually rejected by RF&P's Board of Directors.

Meanwhile, in February of 1991, prior to the RF&P restructuring, the Virginia General Assembly included in the state budget a directive that the

Virginia Retirement System (VRS) transfer to the Commonwealth of Virginia approximately $71 million in exchange for the extinguishment of rights retained by the Commonwealth with regard to approximately 3.5 million shares of RF&P stock owned by VRS. See, Va. Code Ann. § 2.1-187 (Supp. 1990). On May 3, 1991, Governor Wilder signed this appropriation act into law. Prior to this transaction, the Commonwealth had enjoyed the right to purchase the RF&P stock from VRS, who could not sell it to anyone else, at the original purchase price and then could resell it to VRS, thus realizing any market appreciation on the stock. On June 28, 1991, the $71 million was transferred from VRS to the general fund of the State Treasury to obtain clear title for the 3.5 million shares.

On June 18, 1991, RF&P's Special Committee issued an announcement which stated that they had decided to recommend to the Board a revised joint transaction amongst RF&P, CSX, and VRS. (Def. Ex. 10.) Three days later, the RF&P Board issued a press release which stated that the Board had agreed in principle to the three-way transaction. Id. As described, the restructuring consisted of three separate parts. First, a tender offer would take place. On August 30, 1991, System Holdings, Inc. (SHI), a wholly-owned subsidiary created to effect the tender offer and to hold RF&P shares, commenced a public tender offer for all outstanding shares of RF&P at $39.00 per share (the "Tender Offer"). On October 9, 1991, SHI accepted for payment substantially all the RF&P shares held by

the "public" shareholders.[1]

The second transaction was a sale of RF&P's railroad assets to CSX (the "Railroad Sale"), who at this time owned approximately 39% of RF&P's stock. On October 10, 1991, pursuant to a 1991 Asset Purchase Agreement which was executed on August 28, 1991, CSX acquired from RF&P its railroad assets in consideration for the transfer by CSX to RF&&P of approximately 3.9 million shares of the non-voting RF&P stock. The net result of this transaction is that CSX exchanged the majority of its non-voting stock in RF&P and now controls and operates the railroad assets either as the owner or as the beneficiary of

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[1]The RF&P Schedule 14D-9 defines public shareholders as all shareholders who own RF&P stock other than VRS or CSX or their corporate affiliates. See, Def. Ex. 5.)

permanent easements.

The last part of the restructuring was a stock sale for cash (the "Stock Sale"). On October 10, 1991, pursuant to a 1991 Stock Purchase Agreement which was executed on August 28, 1991, VRS purchased from CSX approximately 2.97 million shares of RF&P voting and non-voting stock in exchange for a cash payment by VRS in the amount of $105.8 million. This figure represents a consideration of $35.58 per share. The net result of the Stock Sale was to eliminate CSX as the beneficial owner of 62.7% of the RF&P voting stock and to vest in VRS ownership of substantially all of the RF&P voting stock.

In short, RF&P is now a real estate company with no railroad operations; VRS beneficially owns substantially all of

the outstanding RF&P stock; CSX owns and operates the railroad assets; and almost all of RF&P's public shareholders have received $39.00 per share in cash for their stock and are no longer shareholders of RF&P.

The Plaintiffs claim that the Tender Offer began on June 18, 1991, the date the Special Committee of RF&P issued its press release. By contrast, the Defendants maintain that the Tender Offer commenced on August 30, 1991. The crux of the Plaintiffs' Complaint is that subsequent to the announcement on June 18, 1991, defendants VRS and SHI, aided and abetted by CSX and RF&P, violated Section 14(d)(7) of the Exchange Act and SEC Rules 14d-10 and 10b-13. These provisions require that all holders of stock in a tender offer be paid the

highest price offered to any stockholder during that period of time. The Plaintiffs claim that the "best price" rule was violated by the Defendants when it paid two stockholders more than $39.00 per share for their RF&P stock: (1) the Commonwealth received $48.21 per share on June 28, 1991; and (2) CSX received, under the terms of the Railroad Sale and Stock Sale, executed on August 28, 1991, cash and assets in excess of $39.00 per share.

The Complaint asserts three causes of action. Plaintiffs principle claim advances a violation of the Williams Act.[2] Specifically, Plaintiffs claim that VRS and SHI violated Section 14(d)(7) of the Williams Act and Rule

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[2]15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f).

14d-10 promulgated thereunder. Their second claim alleges violation of SEC Rule 10b-13. Finally, Plaintiffs assert a pendent common law claim for breach of fiduciary duty. The parties agree that if the Court dismisses first and second claims, then it should refuse to exercise jurisdiction over the state claim.

MOTION TO DISMISS (ALL DEFENDANTS)

A. Section 14(d)(7) of the Williams Act and Rule 14d-10.

The Plaintiffs first claim asserts that the Defendants violated Section 14(d)(7) of the Williams Act and Rule 14d-10 promulgated thereunder. Section 14(d)(7) states:

> Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the

> increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

15 U.S.C. § 78n(d)(7) (1988) (hereinafter Section 14(d)(7)). The Section 14(d)(7) requirement that any increase in consideration be available to all tendering shareholders is known as the "best price rule." Rule 14d-10 codifies the best price rule and requires that a person making a tender offer pay every tendering shareholder the highest consideration paid any other shareholder during the term of the tender offer. 17 C.F.R. § 240.14d-10 (hereinafter Rule 14d-10).

In order to establish a violation of Rule 14d-10, Plaintiffs must allege and

prove, at a minimum, four elements: (1) that the bidder, (2) during the pendency of the bidder's tender offer, (3) purchased a security that is the subject of the tender offer, (4) for more consideration than the bidder paid to other shareholders pursuant to the tender offer.

1. Whether any purchases were made during the tender offer.

The primary issue before the Court is whether the transactions with the Commonwealth and CSX occurred during the pendency of the tender offer. This question turns on the legal significance of the announcement on June 18, 1991 by RF&P's Special Committee and the announcement on June 21, 1991 by RF&P's Board of Directors. (Def. Ex. 10.) If these announcements are characterized not

as the commencement of a tender offer by VRS, but, rather, as a fulfillment of RF&P's disclosure requirements under federal law, then this whole case should be dismissed.

Neither Congress nor the SEC has expressly defined the term "tender offer." This was apparently done intentionally since the dynamic nature of tender offers demands judicial flexibility in determining what types of acquisitions should be subject to the Williams Act. Pin v. Texaco, 793 F.2d 1448, 1453 (5th Cir. 1986). A tender offer is "conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price." Note, The Developing Meaning of "Tender Offer" Under the

Securities Exchange Act of 1934, 86 Harv. L. Rev. 1250, 1251 (1973).

As noted above, for Plaintiffs to assert any Rule 14d-10 claim, they must allege and prove that a tender offer commenced for purposes of Section 14(d)(7) and Rule 14d-10 prior to the occurrence of the purchases of which they complain.[3] Rule 14d-2 sets forth the elements required for commencement of a tender offer under Rule 14d-10. Rule 14d-2 provides that, in order to constitute commencement of a tender offer, "[a] public announcement by a bidder through a press release, newspaper advertisement or public statement . . . with respect to a tender offer" must

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[3]Plaintiffs do not dispute that all relevant agreements had been executed prior to VRS's and SHI's formal commencement of the tender offer on August 30, 1991.

include: "(1) The identity of the bidder; (2) The identity of the subject company; and (3) The amount and class of securities being sought and the price or range of prices being offered therefor." 17 C.F.R. § 240.14d-2(b) and (c) (1991) (emphasis added). A public announcement containing such information triggers the operation of all the tender offer rules.

The strict requirements for the commencement of a tender offer are a partial response to the SEC's recognition that public announcements frequently will be made to fulfill a party's obligations to make prompt public disclosure of material events. For instance, Rule 10b--5 requires that a company disclose to the public the existence of, or negotiations over, an agreement to sell or acquire securities. Id. at § 240.10b-

5. In fact, the Supreme Court has held that a company must make a disclosure as soon as the information related to a potential transaction, even speculative information, becomes material to a reasonable investor. Basic Inc. v. Levinson, 485 U.S. 224, 238-41 (1988). Thus, by law, RF&P had an obligation to make known to the public negotiations regarding a possible restructuring of the company.

The SEC has expressly recognized that a company's disclosure obligations may require that statements be made with respect to information concerning the company, and it would create insurmountable conflicts for a tender offer to be deemed commenced by virtue of such disclosure. The SEC could also not impose conflicting regulatory

requirements on companies -- on the one hand, require public disclosure of a material event such as a proposed tender offer and, on the other, treat the required disclosure as the commencement of a tender offer which would thereby cause other transactions by the company to violate the federal securities laws. See, S.E.C. v. Carter Hawley Hale Stores, Inc., 587 F. Supp. 1248, 1253 (C.D. Cal. 1984) ("It would be perverse to hold that required disclosure under one rule is a prohibited solicitation under another rule." (citations omitted)), aff'd, 760 F.2d 945 (9th Cir. 1985).

Despite these principles, the Plaintiffs maintain that the two public announcements made by RF&P in late June, 1991 commenced the actual tender offer. Focusing specifically on the June 18th

release, the Plaintiffs argue that although the release does not explicitly identify the bidder, it is clear from the description of the overall transaction that the bidder is VRS. The release describes the transaction as an improved version of one proposed in August, 1990. Although it is not apparent from the June 18th press release, in that earlier deal, VRS had been identified as the bidder for RF&P stock.

In addition, the Plaintiffs submit a number of news articles in which it is apparent that the media had no difficulty in ascertaining the structure of the transaction and the identity of the tender offer bidder.[4]

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[4]For example, The Washington Times published an editorial which stated:

> [The purchase of stock from CSX] would leave some 6

Furthermore, Plaintiffs allege that the June 18th announcement was a joint announcement to which VRS was a party. As proof for this contention, the Plaintiffs point out that the release quotes Jacqueline G. Epps, the Chair of VRS' Board of Directors, who approved of the proposed deal.[5] The Chairman and CEO of CSX is also quoted. Again, the Plaintiffs argue that the press viewed the announcement as one in which VRS had taken part. For these reasons,

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> million shares (a little more than 33 percent) of RF&P outstanding in the hands of minority owners. VRS proposes to buy them out at $39.00 per share.

Virginia Takes Stock, Wash. Times, June 21, 1991, at F2.

[5]Ms. Epps is quoted as saying only that "while the negotiations have been long and complicated, it appears that everyone stands to gain from the proposed transaction." (Def. Ex. 10.)

Plaintiffs submit that there is enough evidence of a joint announcement to defeat a motion to dismiss. The Court finds that the Plaintiffs arguments are without merit.

It is certainly true that a public announcement of the material terms of a tender offer in advance of the offer's formal commencement is detrimental to the interests of investors and results in many of the abuses the Williams Act was enacted to prevent. Such pre-commencement public announcements cause security holders to make investment decisions with respect to a tender offer on the basis of incomplete information and trigger market activity normally attendant to a tender offer, such as arbitrageur activity. If tender offer activity has begun as a result of a

public announcement, the contest for control of the subject company will occur prior to the application of the Williams Acts and will therefore deny security holders the protections which the Act was intended by Congress to provide. It is for these reasons that Rule 14d-2(b) was enacted. This provision allows investors and courts to easily distinguish between public announcements that start tender offers (and the application of the tender offer rules) and public announcements that do not.

The Court finds that the RF&P press release did not commence a tender offer, as a matter of law, because the release was not issued by VRS or SHI (the bidders), it does not state that there will be a tender offer, and it does not identify VRS or SHI as the bidder. The

only reason why RF&P issued the press release was to comply with the mandatory disclosure requirements under Rule 10b-5 of the Exchange Act.

In a statement directly on point, the SEC has stated that:

> 1. Question: Will a public announcement by the subject company . . . of a bidder's intention to make a cash tender offer together with the information referred to in Rule 14d-2(c) commence the five business day period in Rule 14d-2(b)?
>
> Response: No. Only a public announcement by the bidder or on the bidder's behalf will commence a tender offer pursuant to any of the provisions of Rule 14d-2. As a practical matter, however, if a bidder's intention becomes generally known, the bidder may be unable to deny its intentions, and any affirmation of the information referred to in Rule 14d-2(c) by or on behalf of the bidder would cause the tender offer to start under Rule 14d-2(b).

Exchange Act Release No. 16623, 3 Fed.

Sec. L. Rep. (CCH) Para. 24,284I, at 17,756 (Mar 5, 1980). Here, there can be no reasonable inference that the June 18th announcement was made by VRS or on behalf of VRS. The press release itself seems to make clear that it was issued by the target company, RF&P, and not by the bidder, VRS or SHI. The announcement was issued on RF&P stationery and its headline reads: "RF&P SPECIAL COMMITTEE ANNOUNCES REVISED TRANSACTION." (Def. Ex. 10.) The press release goes on to outline the proposed transaction and includes several statements by C. Coleman McGehee, Chairman of the Special Committee. Mr. McGehee explains that the proposed transaction is still subject to a number of conditions, including approval by the RF&P Board of Directors. Id.

What the media understood and reported based on the press releases is not relevant, unless VRS had somehow positively affirmed the information contained in the newspaper articles. The Court looks solely to the official actions of the tender offer bidder, and the Plaintiffs have made no allegations that VRS in any way endorsed the press reports regarding the restructuring of RF&P. Thus, the Court's analysis is confined to considering the June 18th and June 21st press releases on their face.

The press release does refer to a cash exchange of $39.00 for "any and all shares" held by the public. However, nowhere in the press release is the term "tender offer" used, nowhere are fixed time limits announced, and, most importantly, nowhere is the identity of

the bidder announced. The press release identifies and quotes Jacqueline Epps, but nothing in her statement could be reasonably inferred to mean that VRS was the bidder.[6] Given the preliminary nature of the negotiations at the time, the proposed transaction, consistent with the RF&P press release, ultimately could have taken one of many forms, including a self-tender offer by RF&P, a merger, or an exchange offer.

In sum, neither the June 18th nor June 21st press releases constituted the formal commencement of a tender offer because 1) neither was issued by VRS, the bidder; 2) there is absolutely no evidence that the announcements were a joint effort or that they were made on behalf of VRS; and 3) the identity of the

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[6]See supra note 5.

bidder to the proposed tender offer is not clear from the text of the statements.

As discussed above, the Defendants executed the Stock Sale and the Railroad Sale on August 28, 1991, prior to the announcement and formal commencement of the tender offer by SHI and VRS. The VRS/Commonwealth transaction occurred either on May 3, 1991, the date Governor Wilder signed the appropriations bill into law, or on June 28, 1991, the date actual payment was made from VRS to the general fund of the state treasury. The Court does not need to determine which event was the operative date since both occurrences were well before the start of the tender offer. Thus because no purchases occurred during the pendency of the tender offer, the Plaintiffs Section

14(d)(7) and Rule 14d-10 claims are dismissed. It is not necessary to consider any of the Defendants' additional arguments in support of dismissal of these claims.

B. Rule 10b-13.

Plaintiffs second claim against the Defendants is for violation of Rule 10b-13. This rule states:

> No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security (or any other security which is immediately convertible into or exchangeable for such security), otherwise than pursuant to such tender offer or exchange offer, from the time such tender offer or exchange offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the expiration of the period.

17 C.F.R. § 240.10b-13 (1991). The rule

operates to prohibit purchases during the tender offer period at any price, whether above, below, or at the price offered. Since no purchases were effectuated during the pendency of the tender offer, as stated above, the Plaintiffs Rule 10b-13 claim is dismissed.

C. Breach of Fiduciary Duty.

The Plaintiffs last claim is a state law action for breach of fiduciary duty. A district court may decline to exercise supplemental jurisdiction over a claim if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). The parties and the Court agree that since all of the Plaintiffs federal securities law claims have been dismissed, it would be in the interests of justice to decline to exercise supplemental jurisdiction

over the Plaintiffs' state law claim.

11th AMENDMENT IMMUNITY (COMMONWEALTH DEFENDANTS)

A. Does the Eleventh Amendment Bar Suit Against States Under the Exchange Act.

The Commonwealth Defendants, VRS and SHI, assert that they are immune from a suit brought by private citizens in federal court under the Exchange Act by virtue of the Eleventh Amendment. Although Congress may abrogate a state's sovereign immunity under the Eleventh Amendment for certain types of claims, to do so, it must make its intention unmistakably clear in the language of the statute. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985); Richard Anderson Photography v. Brown, 852 F.2d 114, 117 (4th Cir. 1988), cert. denied, 489 U.S. 1033 (1989).

Alternatively, a state could consent to a suit that would normally be barred by the Eleventh Amendment, but such consent must be given expressly and unequivocally. Atascadero, 473 U.S. at 247; Brown, 852 F.2d at 121.

The Exchange Act does not mention the Eleventh Amendment nor does it attempt to condition a state's participation in securities transactions upon consent under the Exchange Act. However, Title 15 U.S.C. § 78(c)(a)(9) defines a "person" liable under the Exchange Act as follows:

> The term 'person' means a natural person, company, government, or political subdivision, agency or instrumentality of a government.

The Plaintiffs and Defendants disagree over how this provision should be interpreted.

The Plaintiffs rely on Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), in claiming that Congress specifically intended to abrogate the immunity conferred by the Eleventh Amendment in Exchange Act suits. In Fitzpatrick, a case under Title VII with a nearly identical definition of "person," the Supreme Court found the "threshold fact of congressional authorization" to sue the state for money damages in the inclusion in the definition of "person" the terms "governments, governmental agencies, [and] political subdivisions." Id. at 449.

However, the Plaintiffs ignore the fact that Fitzpatrick relied heavily upon the legislative history of the 1972 amendments to Title VII which demonstrated a clear intent to abrogate

sovereign immunity. Prior to 1972, Title VII expressly excluded from its coverage "a state or political subdivision thereof." 42 U.S.C. § 2000e(b) (1970 ed., Supp. IV). That express exclusion was deleted by § 2(1) of the Equal Employment Act of 1972, which also amended 42 U.S.C. § 2000e(f) to include within the definition of "employee" those individuals "subject to the civil service laws of a state government, government agency or political subdivision." 42 U.S.C. § 2000e(f). The term "state" includes a State of the United States, the District of Columbia, etc. Fitzpatrick, 427 U.S. at 449 n.2. These amendments demonstrate a clear congressional intent to abrogate Eleventh Amendment immunity for purposes of Title VII. Id. By contrast, there is no such

comparable legislative history or language referring specifically to state governments in the Exchange Act. Thus, Fitzpatrick and Title VII can clearly be distinguished from the Exchange Act.

Other courts have been unable to ascertain any congressional intent to abrogate sovereign immunity in regards to the Exchange Act. See, Mercer v. Jaffe, Snider, Raitt and Heuer, P.C., 730 F. Supp. 74 (W.D. Mich. 1990); Finkelstein v. Siedel, 692 F. Supp. 1497 (S.D.N.Y. 1988), aff'd in part, rev'd on other grounds, 857 F.2d 893 (2d Cir. 1988); Charter Oak Fed. Sav. Bank v. Ohio, 666 F. Supp. 1040 (S.D Ohio 1987). Similarly, this Court finds that Eleventh Amendment immunity has not been abrogated under Exchange Act.

B. Whether VRS and SHI Deserve the Protection Of the 11th Amendment.

A state agency or state entity shares a sovereign's Eleventh Amendment immunity if it is an instrumentality of the state. See Jacobs v. College of William and Mary, 495 F. Supp. 183, 190 (E.D. Va. 1980), aff'd, 661 F.2d 922 (4th Cir. 1980). Such an entity, however, may not seek shelter under a state's Eleventh Amendment immunity if it has power sufficiently distinct and independent as to be not considered merely a part of the state or merely its alter ego. Artist v. Virginia Int'l Terminals, Inc., 679 F. Supp. 587 (E.D. Va. 1988), aff'd, 857 F.2d 977 (4th Cir. 1988). The parties agree that the Court should consider the following eight factors in determining whether VRS and SHI enjoy the

Commonwealth's immunity:

1. Whether and to what extent any judgment will be payable from the state treasury;

2. The extent of funding provided to the institution by the state;

3. The extent of the state's control in appointing the governing body of the institution;

4. The degree of the institution's autonomy over its operations;

5. Whether the institution is separately incorporated;

6. Whether it has the power to sue and be sued and to enter into contracts;

7. Whether its property is immune from state taxation; and

8. Whether the institution's function is governmental or proprietary.

The parties take opposite positions as to each of the eight Artist factors. Resolving the tension between the parties would require the Court to make numerous

factual determinations regarding the functions of VRS and SHI and their interaction with the Commonwealth of Virginia. Given the longstanding rule that the allegations in the Complaint should be construed in the light most favorable to the non-moving party, Adams v. Bain, 697 F.2d 1213 (4th Cir. 1982), the Court finds that dismissal of the case against the Commonwealth Defendants based on Eleventh Amendment grounds is inappropriate at this stage of the proceedings. Thus, the Commonwealth Defendants Motion to Dismiss is hereby denied.

CONCLUSION

As a matter of law, the RF&P press releases issued in late June, 1991, did not contain the elements necessary to characterize these announcements as the

start of a tender offer. Specifically, the publications were not issued by VRS or on behalf of VRS and never identified VRS as the bidder in a tender offer. The actual tender offer did not begin until August 30, 1991, and, therefore, all the relevant transactions occurred before the tender offer commenced. Thus, the Court grants the Defendants Motion to Dismiss the Plaintiffs' federal securities law claims pursuant to Fed. R. Civ. P. 12(b)(6). Furthermore, the Court declines to exercise supplemental jurisdiction over the Plaintiffs' state law claim.

In addition, the Court denies the Motion to Dismiss made by the Commonwealth Defendants based on grounds of sovereign immunity. This issue would require the Court to make certain factual

determinations which are inappropriate on a motion to dismiss.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

DATE: 1/23/92 \s\ Richard L. Williams
U.S. District Judge

3. **Securities Exchange Act of 1934 Section 14(d)(7), 15 U.S.C. § 78n(d)(7)**

Tender offer by owner of more than five per vestum of class of securities; exceptions

(d)(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variations of the tender offer or request or invitation.

5. SEC Rule 10b-5, 17 C.F.R. § 240.10b-5

§ 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

(Sec. 10; 48 Stat. 891; 15 U.S.C. 78j)
[13 FR 8183, Dec. 22, 1948, as amended at 16 FR 7928, Aug. 11, 1951]

6. SEC Rule 10b-13, 17 C.F.R. § 240.10b-13

§ 240.10b-13 Prohibiting other purchases during tender offer or exchange offer.

(a) No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase or make any arrangement to purchase any such security (or any other security which is immediately convertible into or exchangeable for such security), otherwise than pursuant to such tender offer or exchange offer, froom the time such tender offer or exchange offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the expiration of the period, including any extensions thereof, during which securities tendered pursuant to such tender offer or exchange offer may by the terms of such offer be accepted or rejected. Provided, however, that if such person is the owner of another security which is immediately convertible into or exchangeable for the security which is the subject of the offer, his subsequent exercise of his right of conversion or exchange with respect to such other security shall not be prohibited by this section.

(b) The term "exchange offer" as used in this section shall include a tender offer for, or request or invitation for tenders of, any security

in exchange for any consideration other than for all cash.

(c) The provisions of this section shall not apply to a purchase of a security of the same classs as that which is the subject of a cash tender offer or exchange offer (or of any other security which is immediately convertible into or exchangeable for such security) if such purchase is made by the issuer, by participating employees of the issuer or the employees of its subsidiaries, or by the trustee or other person acquiring such security for the account of such employees, pursuant to (1) a stock option plan involving only "qualified stock options," or qualifying as an "employee stock purchase plan" as those terms are defined in sections 422 and 423 of the Internal Revenue Code of 1954, as amended, or "restricted stock options" as defined in section 424(b) of the Internal Revenue Code of 1954, as amended. Provided, however, that for the purposes of this paragraph an option which meets all of the conditions of that section other than the date of issuance shall be deemed to be "restricted stock optioins"; or (2) a savings, investment, pension or other stock purchase plan providing for both (i) periodic payments (or payroll deductions) for acquisition of securities by or on behalf of participating employees and (ii) periodic purchases of the securities by participating employees, or the person acquiring them for the account of such employees.

(d) This section shall not prohibit

any transaction or transations if the Commission, upon written request or upon its own motion, exempts such transaction or transations, either unconditionally or on specified terms or conditions, as not constituting a manipulative or deceptive device or contrivance or a fraudulent, or deceptive or manipulative act or practice comprehended within the purpose of this section.

(15 U.S.C. 78j, 78m, 78n)
[34 FR 15639, Oct. 15, 1969]

7. SEC Rule 14d-10, 17 C.F.R. § 240.14d-10

§ 240.14d-10 Equal treatment of security holders

(a) No bidder shall make a tender offer unless

(1) The tender offer is open to all security holders of the class of securities subject to the tender offer, and

(2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.

(b) Paragraph (a)(1) of this section shall not

(1) Affect dissemination under Rule 14d-4 (§ 240..14d-4), or

(2) Prohibit a bidder from making a tender offer excluding all security holders in a state where the bidder is prohibited from making the tender offer by administrative or judicial action pursuant to a state statute after a good faith effort by the bidder to comply with such statute.

(c) Paragraph (a)(2) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, Provided that

(1) Security holders are afforded equal right to elect among each of the types of consideration offered and

(2) The highest consideration of each type paid to any security holder is paid to any other security holder receiving that type of consideration.

(d) If the offer and sale of securities constituting consideration offered in a tender offer is prohibited by the appropriate authority of a state after a good faith effort by the bidder to register or qualify the offer and sale of such securities in such state:

(1) The bidder may offer security holders in such state an alternative form of consideration, and

(2) Paragraph (c) of this section shall not operate to require the bidder to offer or pay the alternative form of consideration to security holders in any other state.

(e) This section shall not apply to any tender offer with respect to which the Commission, upon written request or upon its own motion, either unconditionally or on specified terms and conditions, determines that compliance with this section is not necessary or appropriate in the public interest or for the protection of investors.

[51 FR 23882, July 17, 1986]